STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-09-06

Brandi Distasio,

Plaintiff

v.

ORDER
(Motions for Summary Judgment)

Residential Mortgage Services, et al.,

Defendants

This matter is before the Court on the Motion of Plaintiff Brandi Distasio for Summary Judgment on Counts I-IX and Counts XI-XIII of her Complaint, the Motion of Defendant Salem Capital Group, LLC (Defendant Salem) for Summary Judgment on Counts I, IV-IX, and XIII of Plaintiff's Complaint, and the Motion of Defendant Residential Mortgage Services, Inc. (Defendant RMS) for Summary Judgment on all counts of Plaintiff's Complaint.

Factual Background

The record establishes that in July 2006, Plaintiff was a twenty-five year old mother of two, living in subsidized housing, paying $370 per month in rent, and working as a housekeeper at a local hotel. Plaintiff dropped out of school in eighth grade, and has been unable to complete successfully the math portion of the GED program. In March 2006, a friend referred Plaintiff to Robert Raymond, a loan officer at Defendant RMS, to determine whether she could qualify for a loan to buy a house. At the

time, Plaintiff's monthly gross income was approximately $1,350, and her boyfriend's (Keith Reed) income was in the vicinity of $1,700 per month.[1]

Shortly after Plaintiff provided Mr. Raymond with information that Mr. Raymond requested in order to conduct a credit check, Plaintiff received a call from Mr. Raymond in which Mr. Raymond advised Plaintiff to start looking for a house. Plaintiff and Mr. Reed told Mr. Raymond that they wanted their monthly payments to be at or below $1,000, including taxes and insurance. Plaintiff asserts that Mr. Raymond informed her that she could qualify for a $150,000 loan and still have a monthly payment in the vicinity of $1,000. Conversely, Defendant RMS maintains that when Plaintiff told Mr. Raymond that she had signed a contract to purchase a home, Mr. Raymond informed her that he could not arrange financing for less than $1,200 per month.

Ms. Distasio contends that in reliance on Mr. Raymond's representations, she entered into a purchase and sale agreement pursuant to which she would purchase a home for $155,000, with the sellers contributing $5,000 toward closing costs. Her purchase of the home was contingent upon her receiving 100% financing through an 80/20 loan with an interest rate that did not exceed 7.5%. When they met following the execution of the Purchase and Sale Agreement, Mr. Raymond informed Plaintiff and Mr. Reed that the loan would require a monthly payment of approximately $1,340.

Because the financing terms were different than Plaintiff had anticipated, Plaintiff could have terminated the purchase agreement. In fact, Plaintiff told Mr. Raymond that she could not afford a $1,340 monthly payment, and that she was prepared to look for another house. Mr. Raymond advised that he would attempt to improve the terms, and subsequently informed Plaintiff that he could probably arrange for financing at the rate of $1,200 per month. Plaintiff also asserts that Mr. Raymond represented that he would refinance the loan with a lower monthly payment within six months of the

[1] Plaintiff maintains that in connection with her loan application, Mr. Raymond explained that he would count Mr. Reed's income as rent to her and, in that way, add it to her income. Mr. Reed was not, however, listed as a borrower or obligor on any of the loans or loan applications.

closing. The parties disagree as to whether Mr. Raymond represented that the $1,200 monthly payment would include taxes and insurance.

Mr. Raymond subsequently arranged for an appraisal of the subject property, which appraisal, dated June 26, 2006, assessed the property at $240,000. The property sold in 2004 for $185,900.[2] Although Defendant RMS typically provided reviews of appraisals through its underwriting process to determine if the appraisals complied with the secondary market guidelines, because Defendant RMS did not underwrite the first loan obtained by Plaintiff, Defendant RMS did not arrange for a review of the appraisal.

In addition to brokering Plaintiff's first-lien loan, Mr. Raymond also directed Plaintiff to Robert Dicarlo, President of Defendant Salem, which ultimately provided Plaintiff with a second-lien loan in the principal amount of $30,000. The Salem loan was a six-month term "Commercial Note" with a monthly adjustable interest rate beginning at 14.25%, and required monthly payments of interest based upon the monthly adjustment of the interest rate. Under the terms of the Salem loan, a $900 fee would be imposed if the loan extended beyond six months.

Mr. Raymond completed the application for Plaintiff's loan, which application contained the following information: (1) Plaintiff's monthly income was listed as $3,485 ($435 more than it actually was after including Mr. Reed's "rental payment"); (2) Plaintiff's current housing expenses were overstated by $1000 when compared to the verification of rent provided by Plaintiff's landlord; (3) Plaintiff's proposed housing expenses did not include the monthly payments that she would be required to make on a second-lien loan from Defendant Salem; (4) Plaintiff's assets included $22,114 to be held by Defendant Salem; (5) the principal amount of the loan from Defendant Salem was not listed as a liability; and (6) Plaintiff's net worth included the loan from Defendant Salem. Mr. Raymond completed and signed the loan application on July 13, 2006, eight days before Plaintiff signed the

[2]Defendant RMS objects to the Court's consideration of Plaintiff's evidence as to this issue based on the best evidence rule (M.R. Evid. 1002). Because the sale price of the property in 2004 is a "collateral matter," it falls within an exception to that rule. *See* M.R. Evid. 1004(4).

application on July 21, 2006. Plaintiff eventually obtained a first-lien loan brokered by Mr. Raymond with a principal balance of $139,500.

Prior to the closing of the Salem loan, Mr. Dicarlo signed a verification of deposit stating that Plaintiff held $22,110 in a Savings Deposit Account with Defendant Salem. While this verification was sent to Defendant RMS, the record contains no evidence to suggest that Plaintiff was notified of this representation.

On July 13, 2006, in Mr. Dicarlo's office, Plaintiff signed a Mortgage and Security Agreement in connection with the second lien loan. Mr. Dicarlo explained to Plaintiff that she was securing a loan for $30,000, and that she had to repay the loan in six months. Mr. Dicarlo added that Mr. Raymond would refinance the loan before the six-month period expired. Mr. Dicarlo did not, however, represent what the terms of the refinanced loan would be, nor did he make any representations concerning the value of the subject property or any appraisal of the property. Under the terms of this loan, the interest on the loan was prepaid from the loan proceeds and, therefore, Plaintiff was not obligated to make a monthly payment on the loan.

Upon the closing of her purchase of the property for $155,000, Plaintiff was obligated on two loans: the first loan from New Century Mortgage in the principal amount of $139,500 with a three year adjustable rate (starting at 10.325% with a limit of 16.325%), and a second loan with Defendant Salem for $30,000. Plaintiff made timely monthly payments on the first lien loan.

At the end of December 2006, Mr. Raymond contacted Plaintiff about refinancing her loans. When Mr. Raymond told Plaintiff that he could arrange for a loan with a monthly payment of $1,381, Plaintiff was upset because she understood that she would have a lower monthly payment, and a lower interest rate at the time of the refinancing. Mr. Raymond explained that Plaintiff needed to refinance because her Salem loan was coming due and without refinancing, she would have to pay both loans, which would result in a higher monthly payment than the new loan payment. Mr. Raymond also

informed Plaintiff that he could refinance her loan again in six months, and that he would get her to where she wanted to be with her payments.

Defendant RMS underwrote and funded the refinanced loan. At the time of the new loan, Mr. Raymond secured an appraisal, which assessed the property at $265,000. The terms of the new loan included a principal amount of $186,000, an interest rate of $8.125%, and a monthly payment of $1,381.04, exclusive of taxes and insurance.

From 2005 through 2006, Defendant Salem provided 39 loans that had been referred to Defendant Salem by Defendant RMS wherein Defendant Salem provided one loan and Defendant RMS brokered or originated another loan to purchase properties. Twenty-eight of the loans were for residential properties. Some customers of Defendants Salem and RMS complained to the Maine Office of Consumer Credit Regulation about the Defendants' practices. Following an investigation into the complaints, Defendants Salem and RMS signed two "Assurance of Discontinuance" documents wherein they acknowledged, among other things, that Defendant Salem was an unlicensed lender and that "consumers were assured that they would be able to refinance the two loans [into which they had been steered] into a single loan, when in fact Mr. Raymond had no reason to believe that such refinancing would be easy to arrange."[3]

Until at least August 2009, Plaintiff remained current on her payments. She has instituted this action against Defendants Salem and RMS alleging a number of statutory violations and common law torts.

[3] Defendant Salem objected to any reference to the Assurance of Discontinuance resulting from the Office of Consumer Credit Regulation's investigation on the grounds that the documents constitute hearsay and violate the best evidence rule because they are unauthenticated. *See* Salem's Opp. S.M.F. ¶ 100. Defendant Salem's objections are unpersuasive. First, given that Defendants Salem and RMS signed the Assurance of Discontinuance, the documents constitute admissions by party opponents and thus are not hearsay. *See* M.R. Evid 801(d)(2). Further, Plaintiff has submitted affidavits of authenticity from the Superintendent of the Bureau of Consumer Credit Protection and, therefore, established the documents as public records. *See* M.R. Evid. 803(8).

Discussion

I. Standard of Review

M.R. Civ. P. 56(c) provides that summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." M.R. Civ. P. 56(c)). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685.

II. Count I: Alleged Violations of Maine's Unfair Trade Practices Act

Maine's Unfair Trade Practices Act ("UTPA"), 5 M.R.S. §§ 205-A to 214, "provides protection for consumers against unfair and deceptive trade practices. It declares unlawful 'unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.'" *State v. Weinschenk*, 2005 ME 28, ¶ 11, 868 A.2d 200, 205 (quoting 5 M.R.S. § 207). UTPA does not define the terms "unfair" or "deceptive." *Id.* 2005 ME 28, ¶ 15, 868 A.2d at 206. Therefore, "[i]n determining what constitutes an unfair or deceptive act pursuant to the UTPA," Maine courts "are guided by the interpretations given by the Federal Trade Commission (FTC) and the federal courts." *Id.* (citations omitted).

Under federal interpretation, "[t]o justify a finding of unfairness, the act or practice: (1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoidable by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition." *Id.* ¶ 16, 868 A.2d at 206 (citing *Tungate v. MacLean-Stevens Studios, Inc.*, 1998 ME 162, ¶ 9, 714 A.2d 792, 797; *FTC v. Crescent Publ'g Group, Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001); and 15

U.S.C.A. § 45(n) (West 1997)). Importantly, "whether an act or practice is 'unfair or deceptive' in violation of the UTPA" is a question of fact that "must be made by the fact-finder on a case-by-case basis." *Id.* ¶ 15, 868 A.2d at 206.

Although the determination of whether particular conduct is actionable under UTPA is generally a factual question, Plaintiff contends that she is entitled to a judgment as a matter of law because the loan package provided to Plaintiff is presumptively unfair. In support of this contention, Plaintiff cites a recent decision issued by the Supreme Judicial Court of Massachusetts, *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548 (Mass. 2008). Under the *Fremont* standard, which Plaintiff urges the Court to adopt in this case, a loan package is presumptively unfair under the Massachusetts statute (G.L. 93A § 2) that makes unlawful any "unfair or deceptive acts or practices in the conduct of any trade or commerce" where:

> (1) the loans were [Adjustable Rate Mortgage] loans with an introductory rate period of three years or less; (2) they featured an introductory rate for the initial period that was at least three per cent below the fully indexed rate; (3) they were made to borrowers for whom the debt-to-income ratio would have exceeded fifty per cent had [the lender] measured the borrower's debt by the monthly payments that would be due at the fully indexed rate; and (4) the loan-to-value ratio was one hundred per cent, or the loan featured a substantial prepayment penalty (defined . . . as greater than the "conventional prepayment penalty" defined by G.L. c. 183C, § 2) or a prepayment penalty that extended beyond the introductory rate period.

Id. at 554.

According to the Massachusetts court, Fremont, the defendant-lender,

> should have recognized that loans with the first three characteristics just described were "doomed to foreclosure" unless the borrower could refinance the loan at or near the end of the introductory rate period . . . The fourth factor, however, would make it essentially impossible for subprime borrowers to refinance unless housing prices increased, because if housing prices remained steady or declined, a borrower with a mortgage loan having a loan-to-value ratio of one hundred per cent or a substantial pre-payment penalty was not likely to have the necessary equity or financial capacity to obtain a new loan.

In support of her motion, Plaintiff maintains that the loan package negotiated with Defendants Salem and RMS satisfies, and in some instances exceeds, the standards outlined above such that the

Court should declare, as a matter of law, that Plaintiff's loans are presumptively unfair and in violation of UTPA.

Preliminarily, the Court is aware of no Maine court that has adopted the rule outlined in *Fremont*. In addition, the Court is not persuaded of the need for such a rule. Whether an agreement is unfair generally requires an assessment of and resolution of many factual questions that are unique to the agreement at issue. The Court perceives no justification for the establishment of criteria that might shift the burden of proof on those factual issues. The Court, therefore, declines to adopt and apply the *Fremont* standard in this case. Instead, whether the loan package is unfair or deceptive as contemplated by the UTPA remains a factual question to be decided at trial.

In their motions, Defendants first argue that as a matter of law the transactions at issue are exempt from UTPA because they are subject to the Truth in Lending requirements contained in the Maine Consumer Credit Code. Defendants, citing *First Maine Commodities v. Dube*, 534 A.2d 1298, 1301-1302 (Me. 1987), contend that under Maine law, the UTPA, as it existed at the time of the transactions, does not apply to transactions "otherwise administered by any regulatory board or officer acting under State law."[4] To the extent that the transactions at issue are not exempt from UTPA pursuant to *Dube,* Defendants maintain that they are nevertheless entitled to summary judgment because their conduct is not actionable under the UTPA.

In *Dube,* the Law Court held that a real estate broker's activities were exempt from UTPA because "by statute the Maine Real Estate Commission extensively regulates brokers' activities," and because the statutory restrictions expressly governing licensed brokers permitted the type of contract at issue in that case. *See id* at 1301, 1302 (citing 32 M.R.S.A. § 4004 which governed and permitted the kind of agreement at issue in *Dube*). The Court relied primarily on Section 208(1) of UTPA, which contained the following exception from its scope:

Nothing in this chapter shall apply to:

[4] Defendant Salem's Opp. at 6-8.

> 1. Regulatory boards. Transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the State or of the United States; . . .

Dube, 534 A.2d at 1301 (*quoting* 5 M.R.S.A. § 208(1) (1979)).[5]

In support of their motions, Defendants argue that under *Dube*, all transactions that are regulated by an agency are exempt from UTPA. Defendants, however, acknowledge that the holding in *Dube*, at least the interpretation of *Dube* urged by Defendants, has been questioned. *See e.g.* B. McGlauflin "The Exception that Threatens to Swallow the Statute: The Statutory Exception to Maine's Unfair Trade Practices Act," 21 Me. B. J. 152 (summer 2006); *Provencher v. T&M Mortgage Solutions, Inc.*, 2008 U.S. Dist. LEXIS 47616 (D. Me. June 18, 2008).

The Court does not read *Dube* to preclude recovery by Plaintiff as a matter of law. As explained by the First Circuit in *Good v. Altria Group, Inc.*, 501 F.3d 29, 58 (1st Cir. 2007), the Law Court's holding in *Dube* is reasonably construed to mean that a transaction is exempt from UTPA "where it is subject to specific standards left to the enforcement of an administrative agency," *and* when the transaction/conduct is permitted under those regulatory standards.[6] The First Circuit's analysis is consistent with the language of Section 208(1) as it existed prior to 2007. Under the express language of the statute, conduct is only exempt from UTPA if it is both regulated by an agency and permitted under those regulations. Here, the conduct that serves as the basis for Plaintiff's UTPA claim – namely

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[5] Section 208 was amended in 2007. That amendment, which is not controlling in this case, provides that UTPA does not apply to:

> 1. REGULATORY BOARDS. Transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the State or of the United States. This exception applies only if the defendant shows that:
>
> A. Its business activities are subject to regulation by a state or federal agency; and
>
> B. The specific activity that would otherwise constitute a violation of this chapter is authorized, permitted or required by a state or federal agency or by applicable law, rule or regulation or other regulatory approval.

[6] *See Good*, 501 F.3d at 58 (explaining that there did not appear to be federal regulations specifically governing the conduct at issue but, *even if there were*, "the plaintiffs here, in contrast to the plaintiffs in [*Dube*], do not seek to hold . . . [Defendant] liable under [UTPA] for complying with those standards").

alleged misrepresentations and unconscionable conduct – is not within the scope of the statute as the alleged conduct is not permitted under the Maine Consumer Credit Code. *See* 9-A M.R.S. §§ 9-401, 402, & 5-115. Accordingly, the transactions at issue are not exempt from UTPA.

III. Count II: Alleged Violation of the Maine Consumer Credit Code by Defendant RMS

In Count II, Plaintiff claims that Defendant RMS violated Section 9-401 of the Maine Consumer Credit Code (the "Code"). Section 9-401 of the Code provides:

> A creditor or a person acting for him may not induce a consumer to enter into a consumer credit transaction by misrepresentation of a material fact with respect to the terms and conditions of the extension of credit. A consumer so induced may rescind the sale, lease or loan or recover actual damages, or both.

9-A M.R.S. § 9-401.

Plaintiff maintains that Defendant RMS induced her to enter into "two disadvantageous and unaffordable loan packages" through misrepresentations made by its agent, Mr. Raymond. The misrepresentations allegedly made by Mr. Raymond relate to the following: (1) the monthly payments that Plaintiff could expect to pay; (2) the value of the property based on an appraisal that Mr. Raymond commissioned; (3) and Mr. Raymond's ability to refinance Plaintiff's loans after six months with a lower monthly payment. The record plainly establishes that the substance of Mr. Raymond's representations, and the context in which Mr. Raymond made certain representations are very much in dispute. Consequently, summary judgment is not appropriate.

IV. Count III: Unconscionable Conduct by Defendant RMS in Violation of the Maine Consumer Credit Code

In Count III of her Complaint, Plaintiff alleges that Defendant RMS violated Section 9-402 of the Code, which provides:

> 9-402. Unconscionability; inducement by unconscionable conduct
>
> 1. With respect to a consumer credit transaction, if the court as a matter of law finds:
>
> A. The agreement to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may

refuse to enforce the agreement; or

B. Any clause of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable clause, or may so limit the application of any unconscionable clause as to avoid any unconscionable result.

2. If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

3. For the purpose of this section, a change or practice expressly permitted by this article is not in and of itself unconscionable in the absence of other practices and circumstances.

Id.

Although the Law Court has not yet commented on Section 9-402, the Court has previously explained that contract terms can be substantively unconscionable if they are "so one-sided as to shock the conscience." *Barrett v. McDonald Inv. Inc.*, 2005 ME 43, ¶¶ 32-36, 870 A.2d 146, 155 (Alexander, J. concurring) ("Substantive unconscionability or unfairness focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience.") (internal citations omitted). *See also Leeber v. Deltona Corp.*, 546 A.2d 452, 454 (Me. 1988).

On the record before the Court, the Court cannot determine as a matter of law whether the terms of the loan packages are unconscionable. The record includes a number of factual disputes as to the circumstances under which the loans were issued, and the effect of the loan terms. For instance, a central issue in this case is whether the terms of the loans are unconscionable given Plaintiff's financial resources at the time. In order to determine the extent, if any, to which the loans are or were one-sided or unconscionable, the Court must consider the factual evidence regarding Plaintiff's financial circumstances and her ability repay the loans, some of which evidence is disputed. Summary judgment is, therefore, not appropriate.

V. Count IV: Breach of Fiduciary Duty

In Count IV, Plaintiff alleges that Defendants RMS and Salem owed a fiduciary duty to her, which duty they allegedly breached. Under Maine law, "[t]he salient elements of a confidential relation are the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the relation." *Ruebsamen v. Maddocks*, 340 A.2d 31, 35 (Me. 1975). In the specific context of the debtor-creditor relationship, the Law Court has previously explained:

> Standing alone, a creditor-debtor relationship does not establish the existence of a confidential relationship. To demonstrate the necessary disparity of position and influence in such a bank-borrower relationship, a party must demonstrate diminished emotional or physical capacity or. . . the letting down of all guards and bars. We cannot overthrow the findings of the trial court simply because the parties were mature individuals in full possession of their faculties. Confidential relations can, and do, exist between such people. On the other hand, an allegation of one party's inexperience or trust will not by itself warrant an adjudication of a confidential relation without a statement of the facts indicating the actual placing of confidence and trust, and the abuse of the relation.

Stewart v. Machias Sav. Bank, 2000 ME 207, ¶ 11, 762 A.2d 44, 46 (internal citations and quotation marks omitted). *See also Camden Nat'l Bank v. Crest Constr. Inc,* 2008 ME 113, ¶ 15, 952 A.2d 213, 217.

Furthermore, as the United States District Court for the District of Maine has observed, "it seems plain that the relationship of a mortgage broker to a consumer is not inherently a fiduciary or confidential relationship. What is required is additional evidence related to the actual placement of trust in another that creates a disparity of position or influence." *Darling v. Indymac Bancorp., Inc.*, 600 F. Supp. 2d 189, 216 (D. Me. 2008) (M.J. Kravchuck)(*adopted by Darling v. Western Thrift & Loan,* 600 F. Supp. 2d 189 (D. Me. 2009) (J. Woodcock)).

In this case, Defendants Salem and RMS argue that their interactions with Plaintiff did not give rise to a fiduciary duty and, therefore, Count IV fails as a matter of law. Conversely, Plaintiff contends that the record establishes the existence and breach of a fiduciary duty as a matter of law. Specifically,

Plaintiff argues that she "relied on Salem and RMS, expressed doubt about continuing with the loan package when she thought the payment would be too high, but placed her confidence and trust in reassurances that the loan would be refinanced in six months to a lower rate of 6% with a monthly payment of under $1,000."[7]

As noted above, a party alleging the existence of a fiduciary relationship must set forth "a statement of the facts indicating the actual placing of confidence and trust, and the abuse of the relation." *Machias Sav. Bank*, 2000 ME 207, ¶ 11, 762 A.2d at 46. In this case, Defendants Salem and RMS focus on the alleged existence of a fiduciary duty.[8] In order to avoid summary judgment, Plaintiff must produce facts sufficient to demonstrate the existence of a fiduciary duty. *Corey v. Norman, Hanson & Detroy,* 1999 ME 196, ¶ 9, 742 A.2d 933, 938 (explaining that a party opposing summary judgment need only establish the written elements of the cause of action that are challenged by the defendant).

As to Plaintiff's claims against Defendant RMS, Plaintiff's assertions regarding her uncertainty about the proposed loan terms and Defendant RMS's alleged reassurances that Defendant RMS would quickly refinance Plaintiff with a lower-rate loan and a lower monthly payment are sufficient to withstand Defendant's RMS's motion on Count IV.

Plaintiff's claim of a fiduciary relationship with Defendant Salem is based upon assurances allegedly provided by one of Defendant Salem's employees (Mr. Dicarlo). In that encounter, Mr. Dicarlo is alleged to have "explained to Ms. Distasio that" the second-lien loan from Defendant Salem "was a loan for $30,000 that needed to be repaid in 6 months. Dicarlo then added that she did not have to worry about that because [Mr.] Raymond would refinance the loan before the six month period

[7] Pl's Opp. at 15.

[8] Defendant RMS does not make any independent arguments regarding Count IV but, instead, "incorporates by reference" Defendant Salem's arguments regarding that count.

expired."[9] Because a fact finder could conclude, based upon this exchange, that Plaintiff placed her trust in Defendant Salem, an issue for trial exists as to whether a fiduciary relationship existed.

VI. Counts VI & VII: Fraud and Fraud in the Inducement

In Counts VI and VII, Plaintiff alleges that Defendants RMS and Salem either affirmatively misrepresented certain facts regarding Plaintiff's loan packages, or failed to disclose material facts regarding the terms of the loans. Plaintiff contends that she would not have entered into the loans in the absence of the misrepresentations.

In support of its motion for summary judgment and in opposition to Plaintiff's motion, Defendant Salem contends that it never made any misrepresentations to Plaintiff upon which she relied. Defendant Salem further argues that Plaintiff has failed to demonstrate that Defendant Salem actively concealed information from her such that Plaintiff can prevail on a theory of "fraud by omission." Defendant RMS largely relies on Defendant Salem's arguments.

A. Plaintiff's Claims Against Salem

According to Plaintiff, her claim against Defendant Salem is based upon Mr. Dicarlo's statement that Defendant RMS would refinance her first-lien mortgage within six months. Significantly, Defendant RMS did in fact refinance Plaintiff's first-lien mortgage just as Mr. Dicarlo represented. The record establishes, therefore, that Defendant Salem did not make an affirmative misrepresentation.

Plaintiff also contends that Defendant Salem committed actionable fraud by omission. "[W]here there is no affirmative misrepresentation by the defendant, in order to prove fraud a plaintiff must demonstrate an active concealment of the truth or a special relationship that imposes a duty to disclose on the defendant." *Kezer v. Mark Stimson Assocs.*, 1999 ME 184, ¶ 23, 742 A.2d 898, 905 (citations omitted). Because there is a factual issue as to whether a special relationship existed between Defendant Salem and Plaintiff, the issue is whether Plaintiff could prevail even if a special relationship existed between Plaintiff and Defendant Salem.

[9] Pl's Supp. S.M.F. ¶ 56.

"'Active concealment of the truth' connotes steps taken by a defendant to hide the true state of affairs from the plaintiff." *Id.* 1999 ME 184, ¶ 24, 742 A.2d at 905. Further, with respect to the reliance element of a fraud claim, "[w]hen there has been active concealment of a material fact, the plaintiff must justifiably rely on the omission of the material fact." *Id.* at ¶ 26. In this case, Plaintiff's fraud claims are based on the following alleged omissions by Defendant Salem: (1) the failure to inform Plaintiff that the Verification of Deposit signed by Defendant Salem (VOD) characterized the Salem loan as a liquid asset deposited with Salem; (2) the failure to disclose that it had designated its loan as a "commercial" loan in certain loan documents; and (3) and the failure to inform Plaintiff that she would have to pay a $900 fee if she did not satisfy the Salem loan within six months.

Defendant Salem contends that the VOD was not a communication to which Plaintiff was privy and, therefore, the VOD does not constitute a misrepresentation by omission. Defendant Salem further maintains that the terms of its loan, including the fact that it was an "interest only" loan and that Defendant Salem had designated it a "commercial" loan, were evident from the face of the loan documents signed by Plaintiff such that there was no "active concealment." Defendant Salem finally argues that Plaintiff knew that the loan was in fact a "consumer" loan, and thus Plaintiff could not have reasonably relied on the designation of the loan as "commercial."

Although the Salem loan proceeds were mischaracterized on the VOD, that misrepresentation is not actionable under the circumstances presented in this case. In order to be actionable, a defendant's representation must be for the "purpose of inducing another to act in reliance upon it," and the plaintiff must in fact "justifiably rely and act to his or her damage." Simmons, Zillman & Gregory, *Maine Tort Law* § 11.06 (2004 ed.) (citations omitted). Here, although one might reasonably infer that the erroneous entry on the VOD was made for the purpose of inducing a party to act, one cannot reasonably conclude that Plaintiff was that party. In fact, the representation was not made to Plaintiff. Rather, the VOD was submitted in support of Plaintiff's application for a first-lien mortgage. In other words, the representation was made for the purpose of inducing the first-lien lender to lend money to Plaintiff.

Under these circumstances, Plaintiff cannot prevail on her claim. As Section 531 of the RESTATEMENT explains:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

RESTATEMENT (SECOND) OF TORTS § 531 (1977). Because Plaintiff was not the intended recipient of the alleged misrepresentation, and because the record is devoid of evidence from which a fact finder could conclude that Plaintiff relied upon the information in the VOD, the VOD cannot serve as the basis of Plaintiff's misrepresentation claim.

As to Plaintiff's contention that Defendant Salem failed to disclose the terms of the loan, Plaintiff concedes that the terms of the loan were set forth in the promissory note she signed and that the note reflected her understanding of the loan terms.[10] In other words, she does not allege that she believed the terms of the loan were in any way different from those reflected in the promissory note. Plaintiff cannot, therefore, prevail on her misrepresentation claim.

B. Plaintiff's Claims Against Defendant RMS

With respect to Plaintiff's fraud claims against Defendant RMS, the Court is convinced that factual issues remain for trial. Unlike Plaintiff's claims against Defendant Salem, the record demonstrates that Plaintiff had more extensive interaction with Defendant RMS. In particular, the record contains reference to specific representations allegedly made by Mr. Raymond that a fact finder could reasonably conclude are actionable. Although Defendant RMS argues that any reliance by Plaintiff on Mr. Raymond's alleged misrepresentations was not reasonable, the reasonableness of Plaintiff's alleged reliance is a fact question to be resolved at trial. *Devine v. Roche Biomedical Lab.*,

[10] *See* Defendant Salem's Supp. S.M.F. 23; Pl.'s Opp. to Defendant Salem's Supp. S.M.F. ¶ 23.

637 A.2d 441, 446 (Me. 1994). Therefore, neither party is entitled to summary judgment on Plaintiff's fraud claim against Defendant RMS.

VII. Counts VIII & IX: Negligent Misrepresentation and Negligence

The essence of Plaintiff's argument in Counts VIII and IX is that "Defendants failed to exercise reasonable care in communicating information about the mortgage loans and value of the property to Ms. Distasio and about her ability to qualify for, repay, and refinance the loans, thus supplying false information to Plaintiff which induced her to enter into the mortgage loan transactions."[11] In support of their motions, and in opposition to Plaintiff's motion, Defendants argue that they did not owe Plaintiff a duty of care, and that they did not make any misrepresentations.

Maine has adopted section 552(a)(1) of the Restatement (Second) of Torts (1977) as the appropriate standard for negligent misrepresentation claims. Section 552(a)(1) defines negligent misrepresentation as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) Torts § 552(a)(1). *See* also *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990).

With respect to Plaintiff's claims against Defendant Salem, as with Plaintiff's fraud claims, the record lacks evidence upon which a fact finder could determine that Salem made any representations to Plaintiff that could serve as the basis for a negligent misrepresentation claim. However, the record contains several fundamental disputes of fact regarding Plaintiff's claims against Defendant RMS so as to preclude summary judgment in favor of Plaintiff or Defendant RMS.

VIII. Count XI: Defendant Salem's Alleged Violation of Maine's Consumer Credit Code

In Count XI, Plaintiff alleges that Defendant Salem violated Article 5 of the Maine Consumer Credit Code when it provided Plaintiff with a consumer loan without a license, allegedly misrepresented

[11] Pl.'s Mot. at 29.

material terms of the loan in order to induce Plaintiff to enter into the loan agreement, and engaged in "unconscionable" conduct. The pertinent provisions of the Code provide as follows:

Section 2-301 provides:

> Unless a person is a supervised financial organization or has first obtained a license pursuant to this Act from the administrator authorizing him to make supervised loans, he shall not engage in the business of:
>
> 1. Making supervised loans; or
>
> 2. Taking assignments of and undertaking direct collection of payments from or enforcement of rights from an office in this State against debtors arising from supervised loans.

9-A M.R.S. § 2-301.

Section 5-108 provides:

> Unconscionability; inducement by unconscionable conduct
>
> 1. With respect to a consumer credit transaction, if the court as a matter of law finds:
>
> A. The agreement to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement; or
>
> B. Any clause of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable clause, or may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> 2. If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.
>
> 3. For the purpose of this section, a change or practice expressly permitted by this Act is not in and of itself unconscionable in the absence of other practices and circumstances.

9-A M.R.S. § 5-108.

Finally, Section 5-115 provides:

> Misrepresentation

> A creditor or a person acting for him may not induce a consumer to enter into a consumer credit transaction by misrepresentation of a material fact with respect to the terms and conditions of the extension of credit. A consumer so induced may rescind the sale, lease or loan or recover actual damages, or both.

9-A M.R.S. § 5-115.

In its motion for summary judgment, Defendant Salem contends that portions of Plaintiff's claim are time barred, that others fail as a matter of law, and that the Code does not apply to the loans at issue. Under Section 5-201, private actions alleging the violation of Section 2-301 regarding open-end loans must be commenced within 2 years of the last payment due. 9-A M.R.S. § 5-201(2). An action for a violation arising out of other loans, however, must be initiated within 1 year of the last payment due. *Id.* The record establishes that Plaintiff's loans with Defendant Salem were not open-end credit loans,[12] that Plaintiff's last payment on Defendant Salem's loan was due on January 21, 2007, and that Plaintiff commenced this action on November 18, 2008. Insofar as Plaintiff's loan with Defendant Salem was not an open-end loan, Plaintiff was required to assert her claim based on a violation of Section 2-301 within one year of January 21, 2007. Because she failed to do so, Plaintiff's claim based upon an alleged violation of Section 2-301 is barred.

Plaintiff's claims under Sections 5-108 and 5-115 are, however, asserted timely. *See* 9-A M.R.S. § 5-201(1). Defendant Salem nevertheless contends that it is entitled to summary judgment on the claims of misrepresentation and unconscionability because (1) there were no actionable misrepresentations in violation of Section 5-115; (2) "unconscionability" as prohibited by Section 5-108 is merely an affirmative defense to an enforcement action by a lender and not the basis for an affirmative

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[12] 9-A M.R.S. § 1-301(26) defines "open-end credit" to mean:

> a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of those transactions and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. A credit plan which is an open-end credit plan within the meaning of the preceding sentence is an open-end credit plan, even if credit information is verified from time to time.

Id.

claim for damages; and (3) Article 5 of the Code does not apply to the Salem loan. The Court will first address the threshold issue of the applicability of Article 5.

As Defendant Salem notes, the Code expressly excludes a number of transactions from its scope, including:

> [a] loan or credit sale made by a creditor to finance or refinance the acquisition of real estate or the initial construction of a dwelling, or a loan made by a creditor secured by a first mortgage on real estate, if the security interest in real estate is not made for the purpose of circumventing or evading this Act . . .

9-A M.R.S. § 1-202(8).

Section 202(8) further provides: "[w]ith respect to a creditor other than a supervised financial organization, the exemption provided by this subsection applies to Articles 2, 3, 4 and 5 only[.]"

Defendant Salem argues that because its loan to Plaintiff is a purchase-money loan, Article 5 of the Code does not apply to that transaction, and Plaintiff's claims under that portion of the Code are barred as a matter of law. As explained below, the Court agrees.

Although Plaintiff contends that the Salem loan was "made for the purpose of circumventing or evading" the Code such that the exception in Section 1-202(8) does not apply, the language upon which Plaintiff relies only applies to a security interest taken in a non-purchase money loan secured by a first mortgage. Here, there is no dispute that the Salem loan was a purchase money loan rather than another type of loan asecured by a first mortgage on real estate. Accordingly, the Salem loan is exempt from Article 5 of the Code and Plaintiff's remaining claims set forth in Count XI are, therefore, barred as a matter of law.[13]

IX. Count XII: Violation of 9-A M.R.S. §§ 10-101-10-401 of the Maine Consumer Credit Code by Defendant RMS

In Count XII, Plaintiff alleges that Defendant RMS violated those portions of the Maine Consumer Credit Code applicable to mortgage brokers. Specifically, Plaintiff alleges that Defendant

[13] The Court further notes that Plaintiff's claim under Article 3 would similarly be barred, even if the claim had been filed timely.

RMS violated Section 10-302, which requires a mortgage broker to provide consumers with a written description of services. Section 10-302 provides:

> Requirement for written agreement
>
> Each agreement between a consumer and a loan broker must be in writing, dated and signed by the consumer and must include the following:
>
> 1. A full and detailed description of the services to be performed for the consumer, including all guarantees and all promises of full or partial refund of fees paid, whether or not services are completed, and the length of time for which the agreement remains in effect before return of the fees for nonperformance can be required by the consumer;
>
> 2. The terms and conditions of payment, including the total of all payments to be made by the consumer or by any other person or entity, whether to the loan broker or to some other person; and
>
> 3. The following notice:
>
> NOTICE TO CONSUMER: Do not sign this agreement before you read it. You are entitled to a copy of this agreement.

9-A M.R.S. § 10-302.

Under the Code, violation of Section 10-302, or any other provision, entitles an aggrieved consumer to a right of action for damages. *See* 9-A M.R.S. § 10-401(4).[14] Plaintiff maintains that Defendant RMS did not provide her with the required written agreement and, therefore, that she is

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[14] Section 10-401 provides:

> Any loan broker or loan officers of any loan broker that violate any provision of this Title or any rule issued by the administrator, or that through any unfair, unconscionable or deceptive practice cause actual damage to a consumer, are subject to the following:
>
> 1. After notice and hearing, a cease and desist order from the administrator;
>
> 2. After notice and hearing, forfeiture of such portion of the required bond as proportionately may make aggrieved parties whole;
>
> 3. A civil action, by the administrator through the Attorney General, after which a court may assess a civil penalty of not more than $5,000;
>
> 4. A civil action by an aggrieved consumer in which that consumer has the right to recover actual damages from the loan broker or its loan officers in an amount determined by the court, plus costs of the action together with reasonable attorney's fees; and
>
> 5. Revocation, suspension or nonrenewal of its license.

Id.

entitled to judgment as a matter of law. Defendant RMS makes no substantive argument in opposition to Plaintiff's contention. Indeed, Defendant RMS does not dispute Plaintiff's factual assertion that Defendant failed to provide a written statement regarding its services as required by Section 10-302. Accordingly, summary judgment in favor of Plaintiff and against Defendant RMS on Plaintiff's claim that Defendant did not comply with the requirements of Section 10-302 is warranted. Plaintiff will be entitled to offer at trial proof of the damages, if any, that she suffered as the result of Defendant RMS' failure to comply with Section 10-302.

X. Count XIII: Intentional Infliction of Emotional Distress

Both Plaintiff and Defendants move for summary judgment on Count XIII of Plaintiff's Complaint, in which Plaintiff alleges that Defendants Salem and RMS intentionally inflicted severe emotional distress upon her. In Maine, in order to prevail on an intentional infliction of emotional distress claim, a Plaintiff must prove that:

> (1) the defendant engaged in intentional or reckless conduct that inflicted serious emotional distress or would be substantially certain to result in serious emotional distress; (2) the defendant's conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable; and (3) the plaintiff suffered serious emotional distress as a result of the defendant's conduct.

Botka v. S.C. Noyes & Co., 2003 ME 128, ¶ 17, 834 A.2d 947, 952 (citing *Curtis v. Porter*, 2001 ME 158, ¶ 10, 784 A.2d 18, 22-23).

Under this formulation, "[s]erious emotional distress means emotional distress, created by the circumstances of the event, that is so severe that no reasonable person could be expected to endure it." *Id.* Further, "[i]n the context of an IIED claim, it is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery, or whether it is necessarily so." *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶ 15, 711 A.2d 842, 847 (citations and internal quotation marks omitted).

Although Plaintiff cannot prevail on all of her asserted claims, Plaintiff has nevertheless produced sufficient facts regarding Defendants' past business relationship and practices, the terms of the

loan as they related to Plaintiff's financial circumstances, Defendant RMS' alleged misrepresentations, and the impact of Defendants' conduct upon Plaintiff to avoid the entry of summary judgment on Plaintiff's emotional distress claim.

XI. Whether Plaintiff is Entitled to Rescission

Defendant Salem also contends that Plaintiff is not entitled to the remedy of rescission because she waited too long to request rescission, and because she has not tendered the loan proceeds. As explained above, Plaintiff's claim pursuant to Maine's Unfair Trade Practices Act remains for trial. UTPA permits a party aggrieved by an unfair trade practice to bring a claim for "actual damages, restitution and for . . . other equitable relief . . .." 5 M.R.S. § 213(1). Rescission is thus an equitable claim to which Plaintiff is potentially entitled should she prevail on her UTPA claim.[15] Because the timeliness of Plaintiff's request for rescission necessarily requires the Court to make certain factual determinations that are unique to this case, and because Plaintiff has asserted a claim for equitable relief, summary judgment is not appropriate.[16]

XII. Count V: Civil Conspiracy

In Count V of her Complaint, Plaintiff contends that Defendants RMS and Salem, through "joint misrepresentations and fraudulent conduct," conspired to "place many Maine borrowers, including Ms. Distasio, into high cost, high fee loans, regardless of the consequences to the borrowers, in order to earn substantial commissions."[17] As such, Count V purports to state an independent claim of civil conspiracy.

Defendants RMS and Salem move for summary judgment on Count V on the grounds that Maine does not recognize civil conspiracy as an independent and separate tort.[18] Defendants RMS and Salem

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[15] As explained above, Plaintiff is also potentially entitled to request rescission on Count XI (violation of §5-108 of the Maine Consumer Credit Code).

[16] Although Defendant RMS purports to incorporate Defendant Salem's arguments, it has failed to cite any statements of fact supporting an argument against rescission. Accordingly, Defendant RMS has failed to sustain its burden and, therefore, is not entitled to summary judgment as to Plaintiff's claims for rescission.

[17] Pl.'s Opp. at 5.

[18] Defendant RMS offers limited legal argument in support of its motion but, rather, incorporates Defendant Salem's arguments.

further argue that, to the extent Count V may be regarded as a request for the imposition of vicarious liability, Plaintiff has failed to generate any evidence of joint action in this case.

In opposition to Defendants' motions, and in support of her motion, Plaintiff contends that Maine law recognizes that "civil conspiracy may be considered a separate and independent tort when 'a combination and the force of numbers inject a special and unique factual overlay of some additional element worthy of recognition as a basis for the imposition of tort liability (such as, for example, coercion, undue influence or restraint of trade) and which would be absent were the conduct to be undertaken by one person acting alone.'"[19] According to Plaintiff, Defendants conspired to defraud not only Plaintiff but also numerous other borrowers such that separate tort liability for conspiracy is appropriate. In the alternative, Plaintiff contends that she has pointed to undisputed evidence in the record of Defendants' joint commission of tortious conduct[20] such that vicarious liability can be imposed.

To the extent that Plaintiff asserts civil conspiracy as a separate and distinct tort claim, Plaintiff's claim fails as a matter of law. As the Law Court has explained, "[i]n Maine, conspiracy is not a separate tort but rather a rule of vicarious liability." *McNally v. Mokarzel*, 386 A.2d 744, 748 (Me. 1978). *See also Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 8, 708 A.2d 283, 286 (Me. 1998) (explaining that Maine law requires "the actual commission of some independently recognized tort" in order to support a claim for civil conspiracy). Civil conspiracy is thus recognized as a method for alleging that two or more parties are joint tortfeasors and for seeking the imposition of vicarious liability. *See Cohen*, 288 A.2d at 110. *See also Forbis v. City of Portland*, 270 F. Supp.2d 57, 61 (D. Me. 2003) (construing Maine law and noting that "[i]n Maine, there is no separate cause of action for civil conspiracy; it is only a way of obtaining vicarious liability against someone who did not himself perform the tortious act").

[19] Pl.'s Opp. at 5 (quoting *Cohen v. Bowden*, 288 A.2d 106, 110 n.4 (Me. 1972)).
[20] Namely, fraud, intentional misrepresentation and intentional infliction of emotional distress. *See* Pl.'s Opp. at 6.

Generally, in order to prevail on a claim of civil conspiracy, a plaintiff must plead and prove the following elements: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful acts; and (5) damages. *Davric Maine Corp. v. Maine Harness Horsemen's Ass'n.*, 1999 Me. Super. LEXIS 92 (Me. Super. March 29, 1999) (citing *Schott v. Beussink*, 950 S.W.2d 621, 628 (Mo.App. E.D.1997)). *See also Smith v Coyne*, 2004 Me. Super. LEXIS 120 (Me. Super. April 12, 2004).

In this case, the parties dispute whether Plaintiff has sufficiently demonstrated an agreement between Defendants Salem and RMS. Contrary to Defendants' contentions, Plaintiff has produced facts from which a fact finder could conclude that Defendants acted in concert. For example, Mr. Dicarlo is alleged to have told Plaintiff that she need not worry about repaying the Salem loan because Defendant RMS would refinance that loan before it came due. While the Court has concluded that Mr. Dicarlo's representation does not support a fraud claim as to Defendant Salem, in the event that Plaintiff proves fraudulent conduct on the part of Defendant RMS, Mr. Dicarlo's expressed understanding of Defendant RMS's conduct could be evidence of a meeting of the minds between the Defendants. Similarly, Plaintiff has demonstrated that Mr. Dicarlo submitted a Verification of Deposit incorrectly characterizing Defendant Salem's loan to Plaintiff as an asset in support of the first-lien loan brokered by Defendant RMS. Again, while the Court has concluded that the VOD did not constitute a misrepresentation as to Plaintiff, the VOD can be considered evidence of a meeting of the minds between Defendants Salem and RMS. In addition, the Defendants' extensive work together on other loans presents facts that are relevant to Plaintiff's conspiracy claim. These factual issues must be determined at trial. Therefore, none of the parties is entitled to summary judgment on the civil conspiracy claims.

Conclusion

Based on the foregoing analysis, the Court orders:

1. The Court grants Plaintiff's motion for summary judgment on Count XII as to the issue of whether Defendant RMS complied with Section 10-302 of the Maine Consumer Credit Code. Judgment is, therefore, entered in favor of Plaintiff and against Defendant RMS on that issue. The Court denies Plaintiff's motion for summary judgment on the remaining claims.

2. The Court denies Defendants' motions for summary judgment as to Count I.

3. The Court denies Defendant RMS' motion for summary judgment as to Count II.

4. The Court denies Defendant RMS' motion for summary judgment as to Count III.

5. The Court denies Defendants' motions for summary judgment as to Count IV.

6. The Court grants Defendant Salem's motion for summary judgment as to Counts VI and VII. Judgment is, therefore, entered in favor of Defendant Salem and against Plaintiff on Counts VI and VII.

7. The Court denies Defendant RMS' motion for summary judgment as to Counts VI and VII.

8. The Court grants Defendant Salem's motion for summary judgment as to Counts VIII and IX. Judgment is, therefore, entered in favor of Defendant Salem and against Plaintiff on Counts VIII and IX.

9. The Court denies Defendant RMS' motion for summary judgment as to Counts VIII and IX.

10. The Court grants Defendant Salem's motion for summary judgment on Count XI. Judgment is, therefore, entered in favor of Defendant Salem and against Plaintiff on Count XI.

11. The Court denies Defendants' motions for summary judgment as to Count XIII.

12. The Court denies Defendants' motions for summary judgment as to Plaintiff's claim for rescission.

13. The Court denies Defendants' motions for summary judgment as to Plaintiff's civil conspiracy claim.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Order into the docket by reference.

Date: 12/11/09

Justice, Maine Business & Consumer Docket